

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GEORGE BARTZ,

Plaintiff,

vs.

MAGGIE MILLER-STOUT,

Defendant.

NO. CV-08-272-CI

REPORT AND RECOMMENDATION
TO DISMISS COMPLAINT
WITHOUT PREJUDICE

By Order filed October 6, 2008, the court advised Mr. Bartz of the deficiencies of his initial complaint and directed him to amend or voluntarily dismiss within sixty (60) days (Ct. Rec. 7). Plaintiff, a prisoner at the Airway Heights Correction Center, is proceeding *pro se* and has paid the full filing fee; Defendant has not been served.

On December 15, 2008, the court granted Mr. Bartz additional time, until February 6, 2008, to either amend or voluntarily dismiss his complaint. Plaintiff did not comply and he has filed nothing further in this action.

Plaintiff initiated this action claiming unlawful withdrawals were taken from his military retirement payments. He stated these payments were dispersed under the Federal Employees' Retirement System and sent to him at the Airway Heights Correction Center by his daughter. Although not stated in the complaint, it appears the state

1 mandated deductions set forth in RCW 72.09.480 were then applied to
2 these funds. Plaintiff contends his military retirement payments are
3 exempt by some unidentified "Federal Law" from such deductions.

4 In a class action lawsuit in the Western District of Washington,
5 *Wright v. Riveland*, 95-CV-05381-FDB, it was determined the following
6 funds are exempt from deductions made pursuant to R.C.W. 72.09.480:
7 Veteran's Administration benefits received under 38 U.S.C. § 5301(a);
8 Social Security benefits received under 42 U.S.C. § 407(a); proceeds
9 from civil rights action filed pursuant to 42 U.S.C. § 1983; and
10 certain funds distributed to Native Americans under 25 U.S.C. §§ 410,
11 1401-07, and 43 U.S.C. § 1606(h). The court found ERISA benefits are
12 **not** exempt from R.C.W. 72.09.480 and class members had the burden to
13 demonstrate any funds received are exempt from the deductions made
14 pursuant to R.C.W. 72.09.480. (Ct. Rec. 148 of 95-CV-05381-FDB).

15 Subsequently, the Honorable James L. Robart, United States
16 District Judge for the Western District of Washington, dismissed with
17 prejudice similar claims to those raised by Mr. Bartz in cause number
18 06-CV-1100-JLR-JPD. The court recognized only the following as exempt
19 deposit types: tribal funds protected by federal law or court order,
20 veteran's and social security disability benefits when received
21 directly from the federal agency, and proceeds from law suits filed
22 under § 1983. (Report and Recommendation, Ct. Rec. 40 at page 3 of 06-
23 CV-1100-JLR-JPD, adopted by Order filed September 21, 2007, Ct. Rec.
24 41).

25 Here, Mr. Bartz has presented no facts from which the court could
26 infer the funds he receives as part of a military retirement pension,
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1 and through his daughter, fall into any of the above listed
2 categories. In light of the decisions from the Western District of
3 Washington¹, Plaintiff's conclusory claim to a federal exemption,
4 without more, does not state a cognizable claim under 42 U.S.C. §
5 1983.

6 Plaintiff was cautioned if he failed to amend to state a claim
7 upon which relief could be granted, the complaint would be dismissed
8 for failure to state a claim under 28 U.S.C. §§ 1915(e)(2) and
9 1915A(b)(1). Although granted the opportunity and more than four
10 months to do so, Mr. Bartz has failed to amend his complaint to state
11 a cognizable claim or to voluntarily dismiss. Therefore, **IT IS**
12 **RECOMMENDED** the complaint be **DISMISSED without prejudice** and such
13 dismissal count as one under 28 U.S.C. § 1915(g).

14 **OBJECTIONS**

15 Any party may object to a magistrate judge's proposed findings,
16 recommendations or report within ten (10) days following service with
17 a copy thereof. Such party shall file written objections with the
18 Clerk of the Court and serve objections on all parties, specifically
19 identifying the portions to which objection is being made, and the
20 basis therefor. Any response to the objection shall be filed within
21 ten (10) days after receipt of the objection. Attention is directed
22 to FED. R. CIV. P. 6(d), which adds additional time after certain kinds
23 of service.

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25 'The orders, decrees and judgments of other courts are proper
26 subjects of judicial notice. *Papai v. Harbor Tug and Barge Co.*, 67
27 F.3d 203, 207 (9th Cir. 1995).

1 A district judge will make a de novo determination of those
2 portions to which objection is made and may accept, reject, or modify
3 the magistrate judge's determination. The judge need not conduct a
4 new hearing or hear arguments and may consider the magistrate judge's
5 record and make an independent determination thereon. The judge may,
6 but is not required to, accept or consider additional evidence, or may
7 recommit the matter to the magistrate judge with instructions. *United*
8 *States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C.
9 § 636(b)(1)(B) and (C), FED. R. CIV. P. 72; LMR 4, Local Rules for the
10 Eastern District of Washington.

11 A magistrate judge's recommendation cannot be appealed to a court
12 of appeals; only the district judge's order or judgment can be
13 appealed.

14 The District Court Executive is directed to enter this Report and
15 Recommendation and forward a copy to Plaintiff.

16 DATED February 9, 2009.

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18 S/ CYNTHIA IMBROGNO
19 UNITED STATES MAGISTRATE JUDGE
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